

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MATTHEW D. G.,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

Case No. 2010061373

DECISION

The hearing in the above-captioned matter was held on April 6, 2011, at Pomona, California, before Joseph D. Montoya, Administrative law Judge (ALJ), Office of Administrative Hearings. San Gabriel/Pomona Regional Center (Service Agency) was represented by Daniela Martinez, Fair Hearing Manager. Claimant Matthew D. G. was not in attendance, but was represented by his mother, Mrs. Susan G.¹

Evidence was received, argument was heard, and the case was submitted for decision on April 6, 2011.

ISSUE PRESENTED

Should Claimant, who was made “provisionally” eligible for benefits under the Lanterman Act based on a diagnosis of Autistic Disorder, lose his eligibility on the grounds that his original diagnosis was clearly erroneous?

¹ Initials are used for the family surname to protect Claimant’s privacy.

FACTUAL FINDINGS

The Parties, and Jurisdiction:

1. Claimant is a seven-year-old boy who has been eligible to receive services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.² Claimant was made eligible based on a “provisional” diagnosis of Autism. (Ex. 4, p. 2.) Claimant became eligible for services under the Lanterman Act in September 2007.

2. On June 3, 2010, the Service Agency wrote to Claimant’s mother and informed her that Claimant was no longer considered to be eligible for services, effective July 1, 2010. The letter, titled “Notice of Termination of Eligibility” stated that a Service Agency interdisciplinary team had concluded that the original diagnosis, which made Claimant eligible, was clearly erroneous, and that the boy did not suffer from Autism. (Ex. 1.) The letter was accompanied by a Notice of Proposed Action (NOPA), which stated that the Service Agency proposed to terminate services. Thereafter, Claimant’s mother filed a Fair Hearing Request, dated June 9, 2010. All jurisdictional requirements have been met.

The Early Start Assessment of Claimant

3. The record indicates that Claimant received Early Start services prior to his third birthday. He was evaluated by the Service Agency’s Early Start Clinic in June 2006, when he was 32 months, 15 days of age. The evaluation was performed by an occupational therapist. The therapist observed the boy, interviewed his mother, and administered three evaluative instruments, including the Bayley Scales of Infant Development III (Bayley).

4. Developmental milestones were noted as follows: sitting at eight months, creeping at 11 months, walking at 12 months, first words at 14-15 months, combined two words at 28 months.

5. It was concluded that Claimant was then functioning age-appropriately in the areas of cognition, gross and fine motor, social, and personal/self help skills. However, there were clear indicators of problems with communication, especially regarding auditory processing and sensory processing. It was recommended that he undergo a psychological evaluation before he turned three.

6. Some disquieting observations were made, such as the fact that Claimant “engaged in a lot of toe-walking.” (Ex. A, p. 5.) His attention to task was described as “fairly short” though he did well with repeated re-direction. (*Id.*, p. 2.) Although he was interested in his peers, he did not engage appropriately with them, he would “bug” them, and

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

always want to touch or hold them. He also “exhibited fluttering and limited eye contact when he was directly approached up close.” Although he could use simple two or three word phases, such as “juice please” he engaged “in a lot of vocal play and gibber/jabber.” (*Id.*, p. 3.) The assessor believed him to have auditory processing problems because “he almost always repeated everything that was said to him. He would often get stuck in the loop of repeating verbal instructions that he fails to follow through with what he needs to do.” (*Id.*, p. 4.)

The Diagnoses of Claimant’s Condition

7. A series of diagnostic assessments of Claimant, relevant to this case, have been performed during the past five years. One group of assessments was made in 2006-2007, and another group in 2010 and early 2011. The various assessments have generated several different diagnoses: Expressive Language Disorder; Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS); Autistic Disorder; and, Anxiety Disorder, Rule Out. One assessment, performed by Claimant’s school district, tends to point toward Asperger’s Disorder, concluding Claimant remained eligible for special education because of his autistic-like behaviors.

8. (A) The first assessment was performed by Edward G. Frey, Ph.D., in September 2006.³ At that time, Claimant was then two years, eleven months old, and was receiving services from the Service Agency under the Early Start program.

(B) Dr. Frey performed an IQ test, using the Wechsler Preschool and Primary Scale of Intelligence III, and found Claimant to have a full scale IQ of 110, a high average score. Using the Gilliam Autism Rating Scale (GARS), he concluded that Claimant’s probability of suffering from Autism was low. Dr. Frey utilized the Vineland Adaptive Behavior Scales II (Vineland) and found Claimant to have an adaptive behavior composite of 87, with socialization being the weakest domain, as evinced by a score of 80.

(C) Dr. Frey diagnosed Claimant as suffering from Expressive Language Disorder and he concluded that, from an adaptive functioning point of view, there was no substantial handicap present.

9. (A) On May 10, 2007, ASD Consultancy (ASD) issued a written diagnostic evaluation of Claimant, based on evaluations performed over three sessions in March and April 2007.⁴

(B) ASD staff made observations at Claimant’s school and in the clinic, and they utilized a number of test instruments in the evaluation process. First and foremost, they utilized the Autism Diagnostic Observation Schedule, known as the ADOS. Scoring on this

³ Dr. Frey’s report is found at Exhibit 2.

⁴ The ASD report is Exhibit B.

well-accepted test were above the cut-off for Autism, and was deemed “consistent with the diagnosis of Autistic Disorder.” (Ex. B, p. 3.) The Gilliam Autism Rating Scale, Second Edition (GARS-2), indicated that Claimant was very likely to suffer from Autism.

(C) The ASD report indicates that another clinician, Jeanne Lichman, Ph.D., had administered the Childhood Autism Rating Scale (CARS) in March 2007. It is not clear if Dr. Lichman was associated with ASD. According to the ASD report, Dr. Lichman obtained scores in the mildly-moderately autistic range.

(D) ASD diagnosed Claimant as suffering from Autistic Disorder.

10. (A) Following receipt of the ASD report, the Service Agency obtained a psychological evaluation of Claimant from Lisa M. Doi, Ph.D. She evaluated Claimant on August 22 and September 12, 2007, and issued her report, Exhibit 3, in September 2007, approximately one year after Dr. Frey issued his report.

(B) Dr. Doi made note of a letter from Claimant’s preschool teacher, written in July 2007, which indicated that Claimant “demonstrated many of the characteristics of an Autistic child.” (Ex. 3, p. 2.) She also noted the diagnoses made by Dr. Frey and by ASD. She tested Claimant’s IQ with the same Wechsler instrument as had been used by Dr. Frey, the WPPSI-III, and she tested for autism with the ADOS and GARS-2. She assessed his adaptive function with the Vineland.

(C) Dr. Doi was unable to complete the WPPSI-III because of Claimant’s “variable level of cooperation.” (Ex. 3, pp. 2-3.) The Vineland yielded a composite score of 79, in the borderline range, with socialization being the weakest domain, in that the score was 72. The ADOS yielded scores below the autism cut off in the areas of communication and reciprocal social interaction. Notwithstanding that finding, Dr. Doi stated that “these results would appear to reflect some characteristics in the Autistic spectrum.” (*Id.*, p. 6.) The GARS-2 was completed by interview with Claimant’s mother, his preschool teacher from the public school, and the teacher from the Mommy and Me program that Claimant had attended before preschool. The preschool teacher’s responses indicated a possible probability of autism, but the responses of Claimant’s mother and the other teacher indicated a very likely possibility of autism.

(D) Dr. Doi, in her summary and conclusions, stated that Claimant demonstrated some characteristics from the autism spectrum, including qualitative impairment in social interactions and communication, along with restricted, repetitive, and stereotypical patterns of behavior, interests, and activities. However, she found some behaviors not indicative of the malady. Ultimately, she diagnosed Claimant as suffering from PDD-NOS.

11. (A) No further assessments were made until March 2010. At that time, the Service Agency issued a report of an assessment performed by its Autism Clinic. A team headed by Deborah Langenbacher, Ph.D., conducted the assessment. The ADOS Module 3,

the CARS, and the Adaptive Behavior Assessment System II (ABAS II) were the test instruments utilized, along with record review, parent interview, and play observation. That report became the basis of the NOPA, and is found at Exhibit 7.

(B) The outcome of the ADOS administration was a determination that Claimant scored below the cut off for an Autism Spectrum Disorder or Autistic Disorder. Based on his mother's responses to the ABAS III he was found to be mildly delayed. He was found to have appropriate functional receptive language as well as functional expressive language.

(C) The assessment team perceived that Claimant presented with some behaviors and characteristics of a person suffering from an anxiety disorder. The Service Agency team concluded that Claimant does not suffer from autism.

12. (A) Claimant's school district conducted a Triennial Psycho-educational assessment in April and May 2010, and issued a report thereon on May 19, 2010.

(B) Claimant's IQ was tested with the Wechsler Intelligence Scale for Children, 4th edition (WISC IV). It was reported that his full scale IQ could not be interpreted because he demonstrated too much variability in his performance. However, a General Ability Index was established, showing his cognitive skills to be in the high average to superior range.

(C) A number of other tests were administered, to examine what was labeled as "psychological processing." (Ex. E, p. 6.) Tests such as the Wide Range Assessment for Memory and Learning, Second Edition, and the Developmental Test of Visual Motor Integration (VMI) showed that Claimant was functioning in the average to high average ranges.

(D) A Vineland was administered, with Claimant's teacher as the source of information. Based on her reports, the scores for communication and daily living skills were adequate, with scaled scores of 114 and 105, respectively. (The mean is 100, the standard deviation is 15.) Socialization was the weak domain, with an overall score of 81, described as "moderately low." (Ex. E, p. 13.)

(E) The GARS was once again utilized, and based on the reports of Claimant's mother, an index of 76 was yielded, meaning the child is possibly autistic. Based on the teacher's information, an index of 67 was obtained, indicating that it is unlikely that Claimant is autistic. (Ex. 7, p. 7.)

(F) The Gilliam Asperger's Disorder Scale (GADS) was also utilized to assess Claimant's condition, again using the teacher and mother as reporters. The outcomes in each case were a "High Probability of Asperger's." (Ex. 7, p. 7.)

(G) The school district concluded that Claimant remained eligible for special education as a child with autistic-like behaviors.

13. (A) The last and most recent assessment of Claimant was performed by Kaiser Permanente on February 28, 2011. (Ex. E.)

(B) The Kaiser team utilized the CARS, CARS 2 H-F (a second edition of the CARS), the Vineland, and the CASL, which tests language abilities. He was examined by an occupational therapist. It is inferred that a speech therapist administered the CASL and evaluated his language skills. Other members of the team were a psychologist, a developmental pediatrician, and a licensed clinical social worker.

(C) The Vineland yielded a composite score, for adaptive behavior, of 74. In the communication domain, the score was an 86; daily living skills, 76, and socialization, 66. (Ex. E, p. 12.) According to the report, his score on the CARS was 31; the report states that a score of 30 or more “is consistent with autism.” (*Id.*, p. 11.) The score yielded by the CARS 2-HF was 37.5; the report states that a score of 34 or higher “indicates severe symptoms of Autism Spectrum Disorder.” (*Id.*)

(D) The report described Claimant’s behavior during the process, stating that during the unstructured part of the evaluation he was alert and engaged well with the examiners when prompted. “He made brief eye contact when initiating interaction, but avoided eye contact when answering questions. He greatly enjoyed having adult attention and showing his play construction with adults present.” (Ex. E, p. 11.)

(E) The report concluded that based on history and current patterns of behavior, Claimant fit the pattern for a diagnosis of autism. Various behaviors, past and present, were referenced. The report also noted that it can be difficult to assess autism in children who have been participating in effective treatment. “Autistic children who are benefitting from treatment have learned how to interact with their teachers and therapists and often find the 1:1 teaching situation to be highly reinforcing. In a 1:1 assessment with an examiner, such autistic children readily generalize their learned, more typical behavior to the testing setting. For these children, reliance on assessment tools that base ratings on structured 1:1 interactions with a teacher-like adult may result in under diagnosis of autism. Reports from parents and teachers and direct observation in multiple settings may be needed to accurately assess an autistic child who has progressed due to effective treatment.” (Ex. E, p. 13.)

Reports of Service Providers

14. In November 2009, an IEP—Individual Education Plan—meeting was held at Claimant’s school, with the main purpose of determining whether Claimant could be mainstreamed further during his school day.

15. In discussion of the issue, Claimant's mainstream class teacher pointed out that Claimant is easily distracted in that environment, and that the aide who accompanies him to class must constantly redirect his attention. However, because Claimant was at grade level in math, and seemingly bored by the work in the Special Day Class, it was agreed that he would be mainstreamed for math, and he was scheduled to move into a first grade classroom for that subject during that month.

16. On October 22, 2010, Progressive Resources (Progressive), a Service Agency vendor that had been providing services to Claimant, issued a progress report. (Ex. D.) Progressive's report indicates that the firm has been providing Family Support Group services. It appears from the report that the child works in a group with other children, and that goals have been set to increase his social skills. Hence, goal number 1 is to increase his flexibility among peers within a group setting; goal number 2 is to increase Claimant's awareness of appropriate self expression within a group setting. The third goal is to increase his awareness of personal space and boundaries among peers in a group.

17. Tied to the statement of each goal is a statement pertaining to the need for service; each statement is a short paragraph. Furthermore, six benchmarks are described for each of the three goals. Claimant's "skill level" for each benchmark is rated on a scale of 1 to 10, and an overall rating on the same type of scale is provided for each overall goal.

18. Claimant's skill level for each of the three goals is a three on a scale of ten. He has not been rated higher than five on any of the 18 benchmarks, and that rating applies to only three of them. He has been rated at four on four of the benchmarks, and he is at three on the remaining 11 benchmarks.

19. Some descriptions of Claimant's behaviors, taken from the need-for-service statements, or from the summary comments at the end of the report, reveal that Claimant's social and communication skills are diminished. For example, it is stated that he has difficulty regulating around peers, and difficulty attending to tasks other than his preferred activities. He is resistant to sharing and tolerating others, often taking the lead roles during play. Claimant also has trouble communicating and expressing himself in an organized manner, often using an infant-like voice, slurring his speech. He sometimes resists answering questions, looking away from others and making child-like sounds. Claimant is described as having difficulty in initiating and engaging with peers appropriately, often invading other's space. While he often tries to initiate with peers, many of the attempts at initiation make other children uncomfortable; he often tries to initiate interaction with a kiss, usually with male peers. He grabs at others or leans on them. He has to be prompted to decrease his tendency to dominate others, and if the others won't agree on a topic, he has trouble compromising and the gets bossy with the others.

20. According to Progressive's report, although Claimant's self-expression can be described as improved, he remains unable to understand how his emotional communications affect the rest of the group. He often doesn't recognize his peers' increased agitation, when they become agitated because of the way he is behaving toward them, and he apparently

can't tell that they are getting ready to respond in an unhappy way, such as by hitting Claimant.

Diagnostic Criteria

Autism and Related Disorders:

21. Two main sources of assessment criteria are available in this case to evaluate whether or not Claimant is autistic, or suffers from a related disorder. The primary source is the Diagnostic and Statistical Manual of Mental Disorders, also known as the DSM-IV-TR, which is published by the American Psychiatric Association. (Hereafter DSM.) The other source is the Best Practices Guidelines published by the Department of Developmental Services in 2002.⁵ The Guidelines pertain to the assessment of autism and related disorders, while the DSM provides the diagnostic criteria for those conditions.

22. The DSM lists five separate disorders under the heading "Pervasive Developmental Disorders." They are Autistic Disorder, PDD-NOS, Asperger's Disorder or Syndrome, Rhett's Disorder, and Childhood Disintegrative Disorder. Different diagnostic criteria are set forth for each within the DSM. Autistic Disorder is not Asperger's Disorder or PDD-NOS, even though the conditions have similarities.

23. (A) To find that a person suffers from Autistic Disorder, the DSM requires that impairments in social interaction and communication be found, through examination of certain criteria, and there must also be evidence of restricted repetitive and stereotyped patterns of behavior, interests, and activities. There must be delays or abnormal functioning in social interaction, or language as used in social communication, or symbolic or imaginative play, before three years of age. Further, the disturbance must not be better accounted for by Rhett's Disorder or Childhood Disintegrative Disorder. The diagnostic criteria lay out certain touchstones within each of the aforementioned areas, and the person in question must meet a number of the criteria; the symptoms must be clinically significant.

(B) The diagnostic criteria for Asperger's Disorder have some similarities to those set forth for autism, but look for impairment in social interaction and restricted repetitive and stereotyped behaviors. Typically, language development has been adequate, hence there must not be a clinically significant general delay in language, such as the use of single words by age two, and communicative phrases by age three. There must not be clinically significant delay in cognitive development, or in the development of age-appropriate self-help skills, nor in adaptive behavior other than social interaction, and curiosity about the environment. Finally, criteria are not met for another pervasive developmental disorder or schizophrenia.

⁵ Properly, Autistic Spectrum Disorders, Best Practices Guidelines for Screening, Diagnosis, and Assessment, hereafter "the Guidelines."

24. The Department of Development Services (DDS) published the Guidelines after extensive study, with the assistance and participation of numerous experts. The book is not per se a diagnostic manual, but gives guidance in the areas of screening, evaluation, and assessment of those who may suffer from what it labels an “autistic spectrum disorder” (ASD), a reference to the concept that at least some of the maladies categorized as separate pervasive developmental disorders might be seen as a singular condition, on a continuum of related disorders. The Guidelines provide information that may assist the diagnostic analysis. However, the Guidelines do not have the force of law, and are not established as regulations adopted by DDS.

25. (A) Some important concepts may be gleaned from the Guidelines. One is that the term ASD, when used in the Guidelines, is a descriptive term, and not a diagnosis. It is descriptive of three conditions on a spectrum of autism-like conditions: Autistic Disorder, PDD-NOS, and Asperger’s Disorder. (Guidelines, p. 2.) It must be understood that ASD, as defined in the Guidelines, is not co-extensive with the definition of Pervasive Developmental Disorders used in the DSM, as the latter umbrella term also includes Rhett’s Disorder and Childhood Disintegrative Disorder. The term “autistic spectrum disorder” or ASD has been the subject of some controversy among professionals.

(B) The authors of the Guidelines state that the DSM-IV-TR, or its immediate predecessor, the DSM-IV, provide the current standards for the diagnosis and classification of ASD. (Guidelines, p. 3.)

(C) When determining whether or not a person suffers from an ASD, there is no substitute for sound clinical judgment based on experience, familiarity with the population, and familiarity with the research. (Guidelines, p. 4.) Professionals with such experience and expertise are not just found in the regional centers, but also in private health systems and university settings. (*Id.*)

(D) Information obtained from parents is quite valuable. “Because parents are the experts regarding their children, eliciting and valuing parental concerns is imperative.” (Guidelines, p. 14.) The Guidelines make this general statement in the context of screening, but the concept can not be ignored in any case where the parent can provide information pertaining to the child’s development. While potential reporter bias is an issue that can not be ignored, the possibility of reporter bias can not necessarily be allowed to swallow up a parent’s report.

(E) A substantial number of children with an ASD have normal to superior cognitive function; 20 to 25 percent demonstrate such in at least one of the two major cognitive domains, verbal and non-verbal. (Guidelines, p. 49.)

(F) Impairment in communication, rather than in language, is a key issue, as children with ASD have a vast range of language skills. As taught by the Guidelines, “. . . it is clear that the fundamental difficulty is with communication, of which speech and language are components.” Further, “Delays in speech and language alone are not specific to autism,

nor are the presence of intact language skills contraindicated of an ASD.” (Guidelines, p. 60, citations omitted.)

(G) Yet another important concept is that Asperger’s Disorder, which was indicated by the school district’s testing of Claimant, is often diagnosed after age five. This does not mean it can not be diagnosed at an earlier age. As stated in the Guidelines, when assessing children six and over “Asperger’s will emerge more frequently as a potential diagnosis.” (Guidelines, p. 90.) Further, and of importance to this case, the Guidelines point out that both Asperger’s and PDD-NOS have “uncertain boundaries and descriptive dilemmas surrounding [them].” (*Id.*, p. 126.)

(H) ASD’s are associated with a tremendous range in syndrome expression, and symptoms change over the course of development. “The presence of autistic symptomatology is difficult to assess in children who are functioning at a very low or very high level.” (Guidelines, p. 90.)

(I) Diagnosis of ASD’s, and especially PDD-NOS in children and adolescents, must be differentiated from other problems, such as language and sensory impairments. “Since comorbidity and differentiation of psychiatric diagnoses are so vital in this age group [children and adolescents], knowledge and/or consultation with specialists in child psychiatry is required.” (Guidelines, p. 115.) “Depression is one of the most common coexisting syndromes found in children and adolescents with an ASD. This is particularly true for ‘higher functioning’ children who have an awareness of their difficulties. [Citation omitted].” (*Id.*, p. 119.) Anxiety disorders are also common in children with an ASD. (*Id.*, p. 120.) And, differentiating ADD or ADHD from an autism spectrum disorder can be especially difficult. (*Id.*, pp. 120-121.)

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 and 2.

2. The Service Agency bears the burden of proving that Claimant’s diagnosis, upon which his eligibility was based, was “clearly erroneous,” based on section 4643.5, subdivision (b) and Evidence Code section 500.

3. The Service Agency has not carried its burden of establishing that Claimant’s diagnosis was clearly erroneous. At bottom, he has twice been found to be autistic, and on two other occasions he has been deemed to be on the spectrum. That he is considered to have an anxiety disorder at this time is not persuasive when the other recent assessments are considered, let alone when the earlier assessments are considered. Furthermore, the description of Claimant’s behaviors, recently provided by Progressive, does not support the notion that he suffers from anxiety disorder; the behaviors are more consistent with autism,

in that they indicate poor communication, the inability to read social cues, and, at best, awkward social skills.⁶

4. Plainly, this is not an easy child to assess; for example, only Dr. Frey was able to complete an IQ test. As noted by the Kaiser team, it may be more difficult to assess the child because he has had several years of interventions. However, if, as the Service Agency contends, its original diagnosis was erroneous, that is not clear from the stack of reports that constitutes the evidence in this case.

ORDER

The appeal of Claimant Matthew D. G. is hereby sustained, and he shall remain eligible for services.

May 31, 2011

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.

⁶ Progressive's description of his behavior tends to corroborate some of Mrs. G.'s descriptions of how the boy behaves, including his inability to appropriately initiate play with others, and his rigid need to control the activities.